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Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001
Attn: Phillis Johnson-Ball
Environmental Filing

Re: Finance Docket No. 35348, *CSX Transportation, Inc. & Delaware and Hudson Railway Company, Inc. - Joint Use Agreement - Environmental Filing*

Dear Ms. Johnson-Ball:

Applicants CSX Transportation, Inc. ("CSXT") and Delaware and Hudson Railway Company, Inc. ("D&H") submit these comments in response to the Environmental Notice (the "Notice") served in the above-captioned proceeding on July 1, 2010. In the Notice, the Board's Section of Environmental Analysis ("SEA") invited comments regarding Applicants' conclusion that "their [proposed Joint Use Agreement] does not require environmental documentation under the National Environmental Policy Act of 1969" (NEPA), 42 U.S.C. §§ 4321, *et seq.* See Notice at 1. As explained in the Application at 26-27, Exhibit 15 (Operating Plan) and Applicants' May 11, 2010 Letter (the "May 11 Letter"), the proposed transaction is categorically exempt from further NEPA analysis under the Board's regulations. Applicants submit these comments in further support of that conclusion.

The Joint Use Agreement would permit CSXT and D&H to use jointly a north-south rail corridor linking the New York City metropolitan area with the international border crossing at Rouses Point Junction, NY. Implementation of the Joint Use Agreement will generate substantial environmental benefits, including a significant reduction in fuel consumption, particulate emissions and noise, by providing both CSXT and D&H more efficient routes for the movement of their traffic. Specifically, access to the Albany – Saratoga Springs and Saratoga Springs – Rouses Point Segments will reduce the one-way mileage for CSXT-CN traffic moving between Eastern Canada and the Eastern United States by 35 percent (from 403 miles to 261 miles) and will also reduce over-the road transit time for that traffic by approximately 45 percent (from 29 hours to 16 hours). (Application at 11, V.S. Potter at 3-4.) This, in turn, will reduce CSXT's gross ton miles by approximately 442,000,000 GTMs annually. Substitution of the joint use arrangement for D&H's existing trackage rights operations between Albany and Fresh Pond,

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NY will likewise reduce the one-way mileage for D&H shipments in that corridor by 52 miles, generating additional GTM savings.¹

The Board's environmental regulations categorically exclude certain transactions from the requirement of an environmental report and further environmental review where the "action does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in section 1105.7(e) (4) or (5))." 49 C.F.R. § 1105.6(c)(2). One of the referenced "thresholds" – 49 C.F.R. § 1105.7(e)(5) – is intended to ensure that a proposed action does not have "significant" air quality impacts warranting environmental analysis under NEPA. *See* 42 U.S.C. § 4332(C) (requiring environmental analysis of "major Federal actions significantly affecting the quality of the human environment"). The air quality threshold differs depending on whether the proposed action involves operations in an "attainment" or "nonattainment" area, as defined by the National Ambient Air Quality Standards ("NAAQS"). As stated in the Notice (at 6), the proposed Joint Use Agreement includes operations in the vicinity of Albany and Saratoga Springs, NY, both of which are nonattainment areas under the NAAQS. Under the Board's regulations for nonattainment areas, environmental documentation is not required if, *inter alia*, the proposed action will not result in an increase in rail traffic of at least 50 percent (measured in annual gross ton miles) or of at least three trains per day on any segment of rail line. 49 C.F.R. § 1105.7(e)(5)(ii)(A).

The changes in rail operations that would result from implementation of the Joint Use Agreement fall below those thresholds. As stated above, the transfer of CSXT Joint Use Traffic from CSXT's Massena Line to D&H's Saratoga Springs – Rouses Point Segment will reduce CSXT's gross ton miles by approximately 442,000,000 GTMs annually. The elimination of D&H's separate train operations between Albany and Fresh Pond, NY – and, in particular, the need for D&H traffic to move northwest from Albany to Schenectady, NY then back toward Fresh Pond – will generate additional GTM savings.

Applicants contemplate that CSXT traffic will operate over the Albany – Saratoga Springs Segment and the Saratoga – Rouses Point Segment in two new daily trains (one in each direction). (*See* Application, Exhibit 15, Operating Plan at 1-2 (describing single northbound

¹ D&H's current trackage rights route requires D&H trains to move northwest from Albany to Schenectady, NY; then back over CSXT's line between Schenectady and Poughkeepsie, NY; lines owned by Metro North Commuter Railroad between Poughkeepsie and MP 7 near High Bridge, NY; and CSXT and Amtrak lines between Harlem River Yard, Oak Point Yard and Fresh Pond Junction, NY. The proposed joint use route between D&H's Kenwood Yard and Fresh Pond eliminates the inefficient movement of D&H traffic via Schenectady, resulting in an overall reduction in one-way route mileage of 52 miles.

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train departing Selkirk in the morning, and single southbound train departing Montreal in the morning); May 11 Letter at 1-2.) This number corresponds to the two daily trains that CSXT currently operates via its Massena Line to handle CSXT-CN interline traffic to and from Huntingdon, PQ.

The Joint Use Agreement contains a provision that would permit CSXT to move “no more than three (3) trains containing CSXT Joint Use Traffic per calendar day.” *See* Application, Exhibit 2, Joint Use Agreement, § 2.04(h)(2). However, the exercise of this provision by CSXT would not – indeed, it could not – trigger the at least three-trains-per-day threshold for environmental documentation set forth at 49 C.F.R. § 1105.7(e)(5)(ii)(A). Section 2.04(h)(2) must be read in tandem with § 2.04(h)(1), which states that CSXT may move “no more than eight (8) pairs of trains containing CSXT Joint Use traffic per calendar week.” *See* Application, Exhibit 2, Joint Use Agreement, § 2.04(h)(1).² This overall “Maximum Volume Restriction” of 8 weekly pairs of trains establishes a maximum of 16 new trains per week, or only 2.29 new trains per day, regardless of whether CSXT operates a third train on any given day. Thus, the Maximum Volume Restrictions set forth in Section 2.04(h) prohibit operations that exceed the at least three-trains-per-day threshold of 49 C.F.R. § 1105.7(e)(5)(ii)(A).

The at least three-trains-per-day threshold cannot reasonably be interpreted as triggering an environmental documentation requirement any time a proposed action has the potential to result in the movement of a third train on any single day. A more commonsense reading of the Board’s regulation is that the at least three-trains-per-day threshold is intended to encompass transactions that will result in the operation of three or more trains on a regular basis, as measured by the average number of daily trains, over some period of time.³ Average traffic changes over time are far more meaningful in evaluating air quality impacts than occasional daily occurrences. Whether the Board interprets the at least three-trains-per-day threshold in terms of the average number of new daily trains per year, per month or even per week, Section 2.04(h) of the Joint Use Agreement effectively precludes operations in excess of that standard.

² Section 2.04(h)(1) defines a “pair” of trains as “one (1) northbound train and one (1) southbound train.” *Id.*

³ Indeed, other subsections of the Board’s regulations impose thresholds on the basis of “average” traffic or annual traffic – not one-time events. *See, e.g.,* § 1105.7(e)(5)(ii)(A) (“increase in rail traffic of at least 50 percent (measured in gross ton miles annually)”) (emphasis added) § 1105.7(e)(5)(ii)(C) (“average increase in truck traffic”) (emphasis added).

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As discussed above, Applicants' actual plan is to operate only two new daily trains on the Albany – Saratoga Springs and Saratoga Springs – Rouses Point Segments. Section 2.04(h)(2) was included in the Joint Use Agreement to provide a degree of operating flexibility to enable Applicants to respond to unforeseen circumstances. For example, if a train containing CSXT Joint Use Traffic scheduled to operate on Monday is cancelled on account of a locomotive failure or the unavailability of a qualified crew, Section 2.04(h)(2) would permit Applicants to move that train on Tuesday (in addition to the pair of trains regularly scheduled for Tuesday). In such circumstances, the overall number of trains operated in nonattainment areas over that two-day period would average two (not three) trains per day. Section 2.04(h)(2) would also permit CSXT to operate a third train on a given day – subject to the overall weekly limitation set forth in Section 2.04(h)(1) – in response to a large, unforeseen surge in traffic volume. However, the right granted to CSXT in Section 2.04(g) to move trains of up to 8,000 feet in length over the Albany – Saratoga Springs and Saratoga Springs – Rouses Point Segments would, in most instances, make operation of such a third train unnecessary. As stated in the May 11 Letter, based upon CSXT's current traffic volumes, Applicants anticipate that trains carrying CSXT Joint Use Traffic will average only 3,300 feet in length. Section 2.04(g) therefore provides significant capacity for the parties to accommodate occasional surges in CSXT traffic, and even to consolidate traffic from a "cancelled" train, in the next day's regularly-scheduled train.

In sum, both a reasonable interpretation of the Board's regulations and the terms of the Joint Use Agreement confirm that the proposed transaction is eligible for categorical exclusion from the requirement of an environmental report or further environmental review.

Finally, as the Notice states:

"even where the Board's presumptive thresholds for environmental analysis are met, the Board may reclassify a particular transaction or modify the requirement that an EIS or EA be prepared, if the railroad applicant demonstrates that the proposed transaction has no potential for significant environmental effects."

Notice at 5 (citing 49 C.F.R. § 1105.6(d)). Even if the Board's at least three-trains-per-day threshold could reasonably be interpreted in a manner that would result in the Joint Use Agreement exceeding that threshold – and it cannot – the Board should nevertheless exercise its discretion to reclassify the proposed transaction pursuant to 49 C.F.R. § 1105.6(d). The proposed transaction clearly has "no potential for significant [adverse] environmental effects" warranting further NEPA review. The at least three-trains-per-day threshold is intended to ensure that there are no "significant" impacts on air quality that may require further environmental documentation under NEPA. The proposed joint use transaction will not generate any such adverse effects. To the contrary, implementation of the proposed transaction will

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produce an overall improvement in air quality in New York State, by reducing both the distance traversed by CSXT and D&H trains and the fuel consumption, particulate emissions and noise associated with Applicants' operations. Specifically, Applicants project that shifting CSXT Joint Use Traffic from the Massena Line to the 142-mile shorter route via D&H's Albany – Saratoga and Saratoga – Rouses Point Segments will reduce CO2 emissions associated with that traffic by 33%, from 15,300 tons to 10,200 tons annually.⁴ Eliminating D&H's separate, low-density train operations on the Albany – Fresh Pond Segment, and reducing the one-way route mileage for D&H Joint Use Traffic by 52 miles, will generate a further reduction in CO2 emissions in the Albany- New York City corridor.

The proposed transaction will generate other significant environmental benefits as well. Applicants project that the more efficient operations made possible by the transaction will save more than 1,000,000 gallons of fuel annually. Transporting CSXT Joint Use Traffic via the Joint Use Lines will reduce the number of public and private at-grade crossings encountered by trains carrying that traffic from 486 (on the Massena Line) to 251 (on the Albany- Saratoga Springs and Saratoga Springs – Rouses Point Segments). Eliminating separate D&H train operations between Albany and Fresh Pond will produce a net reduction in the overall number of trains operated by Applicants in New York State. In these circumstances, it would not be reasonable to require Applicants (and the public) to engage in a formal review of the environmental effects of the proposed transaction simply because Section 2.04(h)(2) of the Joint Use Agreement might permit the occasional operation of a third train containing CSXT Joint Use Traffic on isolated occasions. The theoretical possibility that a third train might operate on rare occasions manifestly cannot offset the substantial environmental benefits of the efficiency-enhancing changes that Applicants will implement every day.

In sum, the proposed transaction clearly qualifies for a "categorical exclusion" from NEPA review because it will not result in an increase in train operations that exceeds the thresholds set forth at 49 C.F.R. § 1105.7(e)(5)(ii)(A).

⁴ Based on CSXT's validated Carbon Calculator, which can be viewed at www.csx.com/?fuseaction=customers.emissions_carboncalculator.



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The proposed transaction also does not require an historic report under 49 C.F.R. § 1105.9(b), because Applicants will continue to operate all involved rail lines and further Board approval would be required to abandon or discontinue rail service in the future. Applicants have no plans to dispose of or alter any properties subject to the Board's jurisdiction that are 50 years old or older.

Very truly yours,

A handwritten signature in black ink, appearing to read "Terence M. Hynes", with a stylized flourish at the end.

Terence M. Hynes

TMH:aat

cc: Parties of Record
Secretary of Transportation
Attorney General of the United States